RESPONSE REQUESTED

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No. 03-9168

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD SHEPARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when a state offense embraces conduct that constitutes generic burglary under Taylor v. United States, 495 U.S. 575 (1990), as well as conduct that does not, certified copies of police reports and complaint applications contained in state court files may be used to determine that the defendant's guilty pleas were to generic "burglar[ies]" and thus "violent felon[ies]" within the meaning of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 348 F.3d 308. The opinion of the district court (Pet. App. A8-A18) is reported at 181 F. Supp. 2d 14. A prior opinion of the court of appeals (Pet. App. A19-A29) is reported at 231 F.3d 56. A prior opinion of the district court (Pet. App. A30-A41) is reported at 125 F. Supp. 2d 562.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 2003. A petition for rehearing was denied on November 24, 2003 (Pet. App. B3). The petition for a writ of certiorari was filed on February 23, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his plea of guilty in the United States District Court for the District of Massachusetts, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The district court sentenced him to 46 months of imprisonment, to be followed by three years of supervised release. See Pet. App. A32; United States v. Shepard, 125 F. Supp. 2d 562 (D. Mass. 2000) (Shepard I). On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. See Pet. App. A21; United States v. Shepard, 231 F.3d 56, 70 (1st Cir. 2000) (Shepard II). This Court denied review. See Shepard v. United States, 534 U.S. 829 (2001).

On remand, the district court imposed the same sentence. See Pet. App. A18; United States v. Shepard, 181 F. Supp. 2d 14 (D. Mass. 2002) (Shepard III). On the government's second appeal, the court of appeals again vacated petitioner's sentence and remanded for resentencing. See Pet. App. A7; United States v. Shepard, 348 F.3d 308 (1st Cir. 2003) (Shepard IV).

1. On October 17, 1995, petitioner sold a Glock 17, 9 mm pistol and various rounds of ammunition to an undercover agent of the Bureau of Alcohol, Tobacco, and Firearms. Petitioner suggested that the agent remove the serial number from the pistol because it was going to be reported as stolen. See Gov't C.A. Br. 3.

2. On March 3, 1999, petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2. On July 14, 1999, petitioner was

sentenced to 46 months of imprisonment, to be followed by three years of supervised release. Id. at A32.

The principal issue at sentencing was whether petitioner was subject to a 15-year minimum term of imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). The ACCA's enhanced sentence applies to any person who is convicted as a felon in possession of a firearm under 18 U.S.C. 922(g) and who has three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. 924(e)(1). A "violent felony" is defined to include, among other crimes, "burglary." 18 U.S.C. 924(e)(2)(B)(ii). Although the ACCA does not define "burglary," this Court has held that, as used in the ACCA, the term means "generic" burglary, which is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 598 (1990).

As the district court noted in its initial opinion, "[s]ince 1980, when he was 18 years old, [petitioner] has been on an 18-year crime spree." Pet. App. A33. Petitioner's numerous prior convictions, ranging from breaking and entering to assault and battery, were set forth in his presentence report (PSR). See Gov't C.A. Br. 3-4; Pet. App. A33 & A34 n.5. Relying on five of petitioner's prior breaking and entering convictions, the government sought to establish that petitioner was an armed career criminal because he had previously committed at least three violent felonies in the form of burglary. All of the convictions on which

the government relied involved guilty pleas by petitioner to violations of either Mass. Gen. Laws ch. 266, § 16, which prohibits the breaking and entering into a "building, ship, vessel or vehicle" during the night, or Mass. Gen. Laws ch. 266, § 18, which prohibits the breaking and entering into a "building, ship or motor vehicle or vessel" in the daytime. The PSR described the convictions as follows:

> 1. In April 1989, petitioner broke into the Crispus Attucks Children's Center by breaking a window, put the director in fear, and stole certain items. He was sentenced to a term of 18 months in the House of Correction, with six months to be served in custody and the balance suspended for approximately 18 months. See PSR ¶¶ 54-55.
>
> 2. In May 1989, petitioner broke into a personal residence at about 3:00 a.m. He was sentenced to two years in the House of Corrections, with the sentence suspended, and two years' probation. In July 1991, he was found to be in violation of his probation and the suspended sentence was imposed. See PSR ¶¶ 58-59A.
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> 3. In March 1991, petitioner opened and entered a locked storeroom door at a commercial establishment, apparently with a key he had kept after his employment at the store had been terminated. He received a one-year custodial sentence. See PSR ¶¶ 68-69A.
>
> 4. In July 1991, police saw petitioner walking away with a pink pillowcase containing a VCR and a telephone, all of which had been taken from an apartment at 258 Norwell Street. A panel on the third-floor front door had been broken to gain access. Petitioner was sentenced to two years' imprisonment. See PSR ¶¶ 70-71A.
>
> 5. In February 1994, a police officer, apparently responding to an attempted break-in, saw petitioner with both hands extended through a glass partition, attempting to gain entry to an inner door in a building. Petitioner was sentenced to two years in the House of Correction, with six months to be served in custody and the balance suspended for a year and a half. See PSR ¶¶ 76-77A.

For four of the convictions, the government argued that the district court could determine that the convictions were for

"generic" burglary by examining certified copies of police reports and complaint applications included in the state court files for the convictions. See Pet. App. A3, A22. Under Massachusetts criminal procedure, "the 'complaint' is the final step in the charging process roughly equivalent to a federal information." Id. at A3 (citing 1 Mass. Crim. Practice §§ 4.1-4.2 (1998)). The complaint is issued by a magistrate based on a complaint application, which is usually filed by a police officer and incorporates or is accompanied by a police report. Ibid. "The application is customarily sworn and is automatically given to defendants at their arraignments," so Massachusetts courts "can presume that defendants know the information contained in police reports." Ibid. (citing Commonwealth v. Brown, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001)). Although petitioner did not contest the PSR's recitation of the facts underlying the prior convictions, he objected to reliance on the police reports and complaint applications. Id. at A22; Gov't C.A. Br. 7; see Pet. App.4.

The district court rejected the government's request for an enhancement under the ACCA. Pet. App. A36-A39. The court ruled that the complaint applications and police reports could not be considered because they contained facts "neither litigated nor conceded" by petitioner and to consider them would therefore be inconsistent with this Court's decision in Taylor. Id. at A38. In Taylor, this Court held that, in order to determine whether a prior conviction is for generic burglary, and thus a violent felony under the ACCA, the sentencing court should generally "look only to the

fact of the conviction and the statutory definition of the prior offense." 495 U.S. at 602. The Court also stated, however, that the sentencing court may conduct a further inquiry when the statutory definition of the prior offense encompasses both conduct that is generic burglary and conduct that is not generic burglary. In that situation, the Court held, the sentencing court may examine "the charging paper and the jury instructions" to determine whether the jury must have found all the elements of generic burglary in order to convict the defendant. Ibid. If so, the prior conviction counts as one for the "violent offense" of generic "burglary." See ibid.; 18 U.S.C. 924(e). Although Taylor did not expressly address what documents could be considered when a defendant pleads guilty and there are therefore no jury instructions, the district court concluded that Taylor permits consideration of a plea colloquy or plea agreement but not the police reports and complaint applications at issue here. Pet. App. A37-A38.

3. The government appealed, and the court of appeals vacated petitioner's sentence and remanded. Pet. App. A19-A29. The court of appeals noted that this Court in Taylor did not address the extent to which a sentencing court can go beyond the fact of conviction for the purpose of determining an ACCA enhancement when the defendant has pleaded guilty to a crime that encompasses both generic and non-generic burglary. Id. at A24. Considering that question in light of its own precedent, the court of appeals held that there is no "absolute bar" to consideration of police reports and complaint applications when the sentencing court is trying to

determine whether a defendant pleaded guilty to an offense that constitutes "burglary" under the ACCA. Id. at A27.

The court of appeals explained that the question whether the prior conviction constitutes burglary under the ACCA does not turn on whether the defendant explicitly admitted to the conduct constituting generic burglary before or during the sentencing. Pet. App. A26. Instead, the question turns on whether the defendant and the government both believed that the defendant was pleading guilty to conduct constituting generic burglary. Ibid. The resolution of that inquiry, the court concluded, "can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission." Ibid. Because the district court had not conducted "the required analysis of whether the documents before it constituted sufficiently reliable evidence of the government and [petitioner's] shared belief that [petitioner] was pleading guilty to the unlawful entry of a building," the court of appeals vacated petitioner's sentence and remanded for resentencing. Id. at A29.

4. On remand, the district court reimposed its previous sentence. See Pet. App. A8-A18. As directed by the court of appeals, the district court considered the police reports and complaint applications submitted in the initial sentencing, as well as reports and applications for two additional convictions submitted by the government at the resentencing (see id. at A4). The court found that the documents did not provide reliable evidence bearing on the "central question" before the court, which

the court identified as what offenses petitioner had pleaded guilty to in the state courts. Id. at A10. The court explained that, in an affidavit, petitioner had maintained that the police reports underlying his prior convictions were not read to him or discussed at his plea proceedings and that he did not admit to the facts contained in the reports at his plea hearings. Id. at A11. The government, the court observed, had offered no other version of the state court proceedings. Id. at A12. As a result, the court said, it was unable to conclude by a fair preponderance of the evidence that petitioner had pleaded guilty to unlawful entries into buildings with the intent to commit a crime. Id. at A13-A18. The court therefore reimposed the 46-month sentence that it had imposed previously. Id. at A18.

5. The government again appealed, and the court of appeals again vacated petitioner's sentence and remanded for resentencing. Pet. App. A1-A7. The court first observed that there is "an air of make-believe" about this case, because no one seriously disputes that petitioner "in fact broke into half a dozen or more buildings," and he is "just the kind of burglar whom Congress had in mind" when it enacted the ACCA. Id. at A4. The court then noted that, for practical reasons of administration, this Court had ruled in Taylor that sentencing courts could not conduct a de novo inquiry into the conduct underlying a prior conviction in order to determine whether that conviction is a predicate offense for an ACCA enhancement, but rather should focus on whether the conviction was necessarily for generic burglary or some other crime of

violence. Ibid. The problem, the court said, is one that Taylor recognized, namely, that state statutes sometimes embrace both conduct that is generic burglary and conduct that is not. Ibid. The court explained that, in addressing the problem in Taylor, this Court had said that, in cases where prior convictions resulted from jury trials, a sentencing court could look at charging papers and jury instructions in order to determine whether the defendant had been convicted of generic burglary. But, the court of appeals added, this Court had not ruled out consideration of other documents in cases where prior convictions had resulted from guilty pleas. Id. at A5. The court then reviewed two of its own cases, which established that, where prior convictions based on guilty pleas are offered as predicate offenses for an ACCA enhancement, the sentencing court may consider other documents, including a "reliable PSR," to determine whether both the government and the defendant believed that a generically violent crime was involved. See Pet. App. A5-A6 (citing United States v. Harris, 964 F.2d 1234, 1236-1237 (1st Cir. 1992); United States v. Dueno, 171 F.3d 3, 7 (1st Cir. 1999)).

Turning to the instant case, the court of appeals noted that "the reliability of PSR descriptions is not even an issue" because the government was relying on complaint applications and police reports from "the original state court case files." Pet. App. A6. Petitioner, the court noted, had been given a full opportunity to contest the descriptions in the documents and had not done so. Ibid. All petitioner had stated was "that he had not specifically

admitted in open court to breaking into [buildings] and that the underlying police reports were not read to him at the plea hearings." Id. at A7. In those circumstances, the court reasoned, it is so unlikely as to be nearly impossible that "the police reports were mistaken" as to the locations of four of the six crimes or that petitioner had pleaded guilty based on anything other than his burglaries of buildings. See id. at A6-A7. The court therefore concluded that it was "clearly erroneous" for the district court to find that petitioner had not pleaded guilty to at least three burglaries of buildings. Id. at A7. The court therefore vacated petitioner's sentence and remanded the case so that the district court could impose the mandatory minimum ACCA sentence. Ibid.

ARGUMENT

Petitioner contends (Pet. 15-38) that the court of appeals erred in holding that complaint applications and police reports from the court files of prior state convictions may be used to determine that plea-based prior convictions were for crimes that constitute generic burglary under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). Petitioner further contends that the holding of the court of appeals conflicts with Taylor v. United States, 495 U.S. 575 (1990), and with decisions of other courts of appeals. Those contentions lack merit, and this Court's review is therefore not warranted.

1. a. Under the ACCA, a defendant who is convicted of violating 18 U.S.C. 922(g) is subject to an enhanced sentence if he

has three or more previous convictions for violent felonies or serious drug offenses. 18 U.S.C. 924(e). The term "violent felony" is defined to include "burglary." 18 U.S.C. 924(e)(2)(B)(ii). In Taylor, this Court held that a burglary qualifies as a "violent felony" under Section 924(e) if it meets the "generic" definition of burglary, which the Court described as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 598.

The Court also addressed how sentencing courts should determine whether a defendant was convicted of generic burglary. Taylor, 495 U.S. at 599-602. The Court held that sentencing courts "generally" should "look only to the fact of conviction and the statutory definition of the prior offense." Id. at 602. Thus, if the state statute precisely corresponds with the generic definition of burglary (or is narrower, but contains all the critical elements), the conviction qualifies as "burglary" for purposes of Section 924(e). Id. at 599. At the same time, the Court recognized that some state statutes might be drawn more broadly, so as to cover both conduct that is generic burglary and conduct that is not. Ibid. For example, the Court explained, a single burglary statute might proscribe both breaking into an automobile, which would not constitute "generic" burglary, and breaking into a building, which would. Id. at 599, 602. The Court stated that, in such a case, the sentencing court may properly "go beyond the mere fact of conviction" and consult "the charging paper and jury

instructions" to ascertain whether the defendant "was charged only with a burglary of a building" or "the jury necessarily had to find an entry of a building to convict." Id. at 602.

As the court of appeals in this case noted (Pet. App. A5, A24), Taylor did not address how a sentencing court is to determine whether a prior conviction is for generic burglary in a case in which the statute covers both generic burglary and non-generic burglary and the prior conviction arose from a guilty plea. In that situation, there are no jury instructions, and it is not meaningful to ask whether "the jury necessarily had to find an entry of a building to convict." 495 U.S. at 602. The more appropriate question, as then-Chief Judge Breyer explained in United States v. Harris, 964 F.2d 1234, 1235 (1st Cir. 1992), is whether "the defendant and the government both believed that the generically violent crime ('building') rather than the generically non-violent crime ('vehicle') was at issue." To answer that question, it is reasonable and appropriate for the sentencing court to consult reliable documents in court files that indicate "the conduct in respect to which the defendant was charged and pled guilty." Ibid.[1]

[1] See United States v. Adams, 91 F.3d 114, 116 (11th Cir.) (per curiam) (allowing consideration of PSR), cert. denied, 519 U.S. 1047 (1996); cf. United States v. Hernandez, 218 F.3d 272, 279 (3d Cir. 2000) (allowing consideration of "easily produced court documents" to determine career offender status under Sentencing Guidelines § 4B1.1); United States v. Coleman, 158 F.3d 199, 202-203 (4th Cir. 1998) (en banc) (allowing consideration of "statement of charges" filed by complaining witness to determine whether conviction for assault is a "violent felony" under ACCA); United States v. Hill, 131 F.3d 1056, 1063 (D.C. Cir. 1997) (allowing consideration of "various court documents" to determine whether conviction is a "crime of violence" under Sentencing Guidelines § 2K1.1(a)(2)).

As the court of appeals held here, when the state charging papers merely track the statutory language, and no plea agreement or plea colloquy is available, the sentencing court may properly rely on certified copies of police reports and complaint applications that formed the basis for the charging documents and are contained in the state court files. See Pet. App. A6-A7, A26-A27. Reliance on those documents to determine whether the plea was to generic burglary is particularly appropriate in cases such as this one where the defendant has never contested the factual accuracy of the documents. See id. at A6-A7. Restricting the sentencing court's consideration to the charging documents, plea colloquies, and plea agreements would make application of the federal sentencing enhancement "hinge on the happenstance of state court record-keeping practices" and the vagaries of state prosecutors' charging practices. See id. at A27.

b. Petitioner errs in contending (Pet. 19-26) that the court of appeals' holding conflicts with Taylor. As discussed above, Taylor did not address how to determine whether a conviction based on a guilty plea under a statute that criminalizes both generic burglary and non-generic burglary was in fact for generic burglary. See Pet. App. A5. Nor did it explicitly rule out attention to documents in the court files besides the charging papers and jury instructions, particularly in the guilty plea context. See ibid.

Petitioner contends (Pet. 19) that the decision below conflicts with Taylor because "Taylor requires a determination of whether the factfinder necessarily found the defendant guilty of a crime which includes all the elements of generic burglary," while the decision below "requires a determination of whether, in the guilty plea, the parties both believed that generic burglary was at issue." See also Pet. 25-26. Contrary to petitioner's contention, that difference does not constitute a conflict between Taylor and the decision below. Rather, it reflects that Taylor addressed the situation in which a factfinder adjudicated the defendant's guilt, while this case addressed the different situation in which the defendant pleaded guilty.

Petitioner also mistakenly contends (Pet. 20) that Taylor "prohibits inquiry into the facts underlying the prior conviction," while the decision below requires such an inquiry. See also Pet. 22. What Taylor prohibits is an inquiry into the facts underlying a prior conviction for an offense that does not include the elements of generic burglary. When an offense does include generic burglary, but also includes non-generic burglary, Taylor permits examination of sources in the case record to determine the basis for the defendant's particular conviction. When a prior conviction rests on a jury verdict, Taylor allows consideration of the charging papers and jury instructions to determine whether "the jury necessarily had to find an entry of a building to convict." 495 U.S. at 602. In parallel fashion, when a prior conviction rests on a guilty plea, the decision below permits consideration of

reliable documents in the court files to determine whether the defendant and the prosecution alike understood the defendant to be pleading to conduct that constitutes generic burglary.

Consideration of the police reports and complaint applications from the court files of the prior convictions that are at issue here is consistent with Taylor's endorsement of consideration of the charging papers, because, in Massachusetts courts, "the 'complaint' is the final step in the charging process." Pet. App. A3 (citing 1 Mass. Crim. Practice §§ 4.1-4.2 (1998)). The complaint is issued based on a complaint application, which usually incorporates or is accompanied by a police report. Ibid. "The application is customarily sworn and is automatically given to defendants at their arraignments," so Massachusetts courts "can presume that defendants know the information contained in police reports." Ibid. (citing Commonwealth v. Brown, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001)).

Although petitioner submitted an affidavit stating that the state courts did not "read" the police reports to him or ask him whether the information in them was true and that he did not admit their truth as part of his pleas, Pet. App. A4, petitioner has never suggested any conceivable factual basis for his guilty pleas other than the facts alleged in the reports. Petitioner's affidavit also must be considered in light of Massachusetts' Rules of Criminal Procedure, which require the judge to find a factual basis for a guilty plea before accepting it. See Mass. R. Crim. P. 12(c)(5)(A). In light of the presumption of regularity that

attends guilty plea proceedings, see Parke v. Raley, 506 U.S. 20, 29-30 (1992), federal courts can reasonably assume compliance with the factual basis requirement of petitioner's pleas. Absent some reason to believe that petitioner's crimes involved a boat or motor vehicle, there is a compelling inference that the state courts, in accepting petitioner's pleas, relied on the facts set forth in the police reports and complaint applications in the state court files.

Petitioner mistakenly contends (Pet. 20, 22-23) that the court of appeals required sentencing courts to hold evidentiary hearings to examine the facts underlying prior convictions. On the contrary, the court of appeals took pains to emphasize that its intention was to avoid "enmesh[ing] the district court in the kind of factually disputed 'archeological dig' about the defendant's conduct that Taylor guards against, with all the attendant practical difficulties of holding mini-trials on a defendant's prior convictions." Pet. App. A28. Petitioner is likewise mistaken when he suggests that the court of appeals has required "fact-intensive mini-trials" (Pet. 26). Reviews of certified documents contained in the court files for the prior state convictions are scarcely fact-intensive mini-trials.

2. Petitioner is also incorrect in asserting (Pet. 32-38) that the court of appeals' holding conflicts with decisions of other courts of appeals. None of the decisions cited by petitioner holds that a sentencing court may not consider police reports and complaint applications to determine whether a defendant pleaded guilty to "burglary" within the meaning of the ACCA. Thus, there

is no conflict between the decisions below and any of those decisions.[2]

In United States v. Howze, 343 F.3d 919, 921-924 (7th Cir. 2003) (cited at Pet. 33), the issue before the court was not what documents may be considered to determine whether a prior conviction counts as "burglary" under the ACCA. Rather, the issue was whether flight to avoid arrest and theft from a person are "violent felon[ies]" because they "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). United States v. Parker, 5 F.3d 1322, 1323-1324 (9th Cir. 1993) (cited at Pet. 33), also involved a different question than the one here. The question in that case was how to apply Taylor when the jury instructions have been lost or destroyed. The court had no occasion to address the Taylor requirements in the guilty plea context because Parker involved a prior conviction following a jury trial.

In United States v. Bentley, 29 F.3d 1073 (6th Cir.), cert. denied, 513 U.S. 1028 (1994) (discussed at Pet. 33-34), the court also did not address whether a sentencing court may consider police reports or complaint applications. Although the case involved a guilty plea, that question did not arise because the record of the defendant's prior conviction was limited to an indictment and a

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[2] Petitioner's contention (Pet. 26-32) that there are "two diametrically opposed lines of authority" within the First Circuit itself is not a basis for this Court's review. Any disagreement among the First Circuit's cases should be addressed by that court through en banc review. See Wisniewski v. United States, 353 U.S. 901 (1957) (per curiam).

judgment that did not necessarily describe a generic burglary. See id. at 1078.

United States v. Kirksey, 138 F.3d 120 (4th Cir.), cert. denied, 525 U.S. 849 (1998) (cited at Pet. 34), involved neither burglary convictions nor convictions based on guilty pleas. Nonetheless, to the extent it is relevant, Kirksey supports the decision in this case. In Kirksey, the court endorsed the sentencing court's consideration of complaining witnesses' statements as incorporated in the charging documents for the prior convictions. See id. at 125-126. Those statements are the functional equivalent of the police reports and complaint applications at issue in this case.

United States v. Richardson, 313 F.3d 121, 126-128 (3d Cir. 2002) (cited at Pet. 34, 35-36), also involved neither a prior conviction based on a guilty plea nor how to determine whether a prior conviction constitutes "burglary" under the ACCA. Rather, the question in Richardson was how to determine whether a juvenile adjudication qualifies as a "conviction" because it "include[d] a finding that [the defendant] ha[d] committed an act of juvenile delinquency involving a violent felony." 18 U.S.C. 924(e)(2)(C).

United States v. Allen, 282 F.3d 339 (5th Cir. 2002) (cited at Pet. 34, 35), also did not address what documents may be considered to determine whether a prior conviction constitutes "burglary" under the ACCA. Allen concerned whether a prior conviction was a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii). The offense of conviction, as defined by state law, met the ACCA's

definition of a "serious drug offense" when the conviction was entered, but state law had since been amended. See 282 F.3d at 341-343. The defendant contended that the conduct underlying the conviction would no longer be punishable under state law as an offense that meets the definition of a "serious drug offense," and he sought to rely on a police report to establish the conduct. See ibid. The court held that reliance on the police report would be inconsistent with Taylor, see id. at 343, a ruling that was correct under the circumstances. Allen did not involve the "narrow range of cases" in which Taylor permits a court "to go beyond the mere fact of conviction." Taylor, 495 U.S. at 602. Under Taylor, a court may look beyond the statute of conviction only where that statute criminalizes both conduct that constitutes a predicate offense under the ACCA and conduct that does not constitute a predicate offense. See id. at 599-602. Therefore, resort to any documents other than the statute of conviction was impermissible in Allen. Moreover, the court in Allen would have reached the same result whether or not it allowed consideration of the police report, because the qualification of a conviction as an ACCA predicate depends on the elements of the offense of conviction at the time of the conviction; whether an offense qualifies is not altered by subsequent changes in the law defining the offense.

United States v. Taylor, 932 F.2d 703 (8th Cir.), cert. denied, 502 U.S. 888 (1991) (cited at Pet. 34-35), was an appeal from the resentencing that followed this Court's decision in Taylor. The court of appeals affirmed the defendants' sentences

under the ACCA because the relevant indictments showed that their prior burglary convictions were based on statutes that criminalized only generic burglary. Id. at 707, 709. The court had no occasion to consider what documents may be considered when a defendant has pleaded guilty to an offense that criminalizes both generic and non-generic burglary.

In United States v. Sparks, 265 F.3d 825 (9th Cir. 2001) (cited at Pet. 35), the prior conviction resulted from a guilty plea to entry of storage lockers, and the court held that "a prior conviction for 'burglary' of storage lockers should not be counted as generic burglary unless the judicially noticeable facts reveal that the lockers were large enough to accommodate a person." Id. at 835. Although some language in the court's opinion suggests that the sources of "judicially noticeable facts" in guilty plea cases may be limited to "the indictment or information and the guilty plea," see ibid., the court was not presented with and consequently did not address the question whether police reports and complaint applications from the court files of the prior convictions may also be sources of "judicially noticeable facts."

Similarly, in United States v. Barney, 955 F.2d 635 (10th Cir. 1992) (cited at Pet. 35, 37), where the court vacated an ACCA sentence based on prior burglary convictions resulting from guilty pleas because the relevant indictments did not show that the convictions involved generic burglaries, the court was not asked to consider whether certified police reports and complaint applications from state court files may be used to determine the

nature of the prior convictions. In a later case, United States v. Haslip, 160 F.3d 649, 656-657 (10th Cir. 1998), cert. denied, 526 U.S. 1044 (1999), where the judgment for a prior conviction and the plea colloquy were not available, the court endorsed reliance on an authenticated copy of the complaint and a journal entry to determine that the defendant pleaded guilty to a generic burglary. That approach is consistent with the approach taken by the court of appeals in this case.

Although petitioner does not cite the case, in United States v. Payton, 918 F.2d 54 (8th Cir. 1990), the court of appeals reversed when the sentencing court relied on a police report to determine whether the defendant pleaded guilty to generic burglary. In Payton, the defendant had pleaded guilty to breaking and entering under a state law that covered generic and non-generic burglary. Id. at 55. Although the defendant's prior state conviction was based on a guilty plea rather than a jury verdict, the Eighth Circuit summarily concluded that "the district court erred in looking beyond the statute, the charging paper and the jury instruction." Id. at 56. Later Eighth Circuit cases, however, recognize that sentencing courts are not limited to that narrow range of documents where the prior convictions resulted from guilty pleas. For example, the Eighth Circuit has permitted reliance on the text of the guilty plea, see United States v. Demint, 74 F.3d 876, 877 (8th Cir.) cert. denied, 519 U.S. 951 (1996), and on the undisputed facts in the PSR, see United States v. Menteer, 350 F.3d 767 (8th Cir. 2003), pet. for cert. pending,

No. 03-8987 (filed Feb. 17, 2004). Menteer, in particular, suggests that the Eighth Circuit would reach the same result that the First Circuit reached here in a case, like this one, where the PSR recited the underlying facts supporting the prior conviction and the defendant never disputed those facts.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2004

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[3] Petitioner also does not cite United States v. Corona-Sanchez, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc), in which the court of appeals rejected reliance on the federal PSR unless it expressly references, as the source of its information, state court documents whose consideration the Ninth Circuit has approved, such the plea agreement, a transcript of the plea hearing, or the judgment of conviction. Corona-Sanchez does not conflict with the decision in this case, however, because the court there did not consider the appropriateness of relying on police reports and complaint applications that were filed in support of the state complaint and of which the defendant is presumed to have notice. Rather, Corona-Sanchez considered only the propriety of reliance on the federal PSR, which the court below made clear is not at issue in this case, see Pet. App. A6.